

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Request for Blanket Waiver of)	ET Docket No. 05-345
Section 74.832(h))	

To: Chief, Office of Engineering and Technology

**JOINT COMMENTS OF
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC. AND THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The Association for Maximum Service Television, Inc. (“MSTV”) and the National Association of Broadcasters (“NAB”) respectfully request that the Commission dismiss the above-captioned request of the Nuclear Energy Institute (“NEI”) and United Telecom Council (“UTC”), which asks that nuclear power plants be granted a blanket, industry-wide waiver to use Telex wireless intercom systems in spectrum reserved for the public’s free, over-the-air television service.¹ The NEI/UTC waiver petition is ultimately an attempt to revive a similar request filed by Telex in 2003. The Wireless Telecommunications Bureau appropriately denied Telex’s waiver request less than two years ago,² and the Office of Engineering and Technology (“OET”) should likewise dismiss NEI/UTC’s waiver request.

Grant of NEI/UTC’s waiver request is not warranted. First, prior statements by one of the applicants suggest that public safety is not at issue here. Rather, the waiver request is

¹ See Petition for Waiver of Nuclear Energy Institute and United Telecom Council, ET Docket No. 05-345 (filed July 20, 2005) (“NEI/UTC Blanket Waiver Petition”).

² *Order In the Matter of Telex Communications, Inc., Request for Waiver to Allow The Use of Certified Wireless Intercom Equipment at Nuclear Facilities for Security Operations Near Reactors*, DA 04-3691 (rel. Nov. 29, 2004) (“Telex Waiver Denial”).

motivated by a desire to protect certain power plants' decision to purchase and unlawfully use Telex intercom and headset equipment. Second, although NEI and UTC claim that suitable devices are unavailable for which a Part 90 user, such as a nuclear power plant, would be eligible, several such devices are in fact on the market *today*. Given the fact that such devices are currently on the market, a blanket waiver would be improper: the Commission could instead grandfather in – for a limited period of time – those power plants that improperly purchased the Telex equipment without compounding the problem by granting an unjustified, industry-wide blanket waiver. Finally, the request fails to address coordination obligations, geographic constraints, temporal restrictions, and other limitations designed to prevent interference to free, over-the-air television services.

I. NEI/UTC's BLANKET WAIVER REQUEST IS A FLAWED ATTEMPT TO REVIVE A PREVIOUSLY DENIED REQUEST.

Significantly, the Wireless Telecommunications Bureau previously denied a waiver request filed by Telex which sought the same type of relief that NEI/UTC seeks here. The Bureau found that in seeking a blanket waiver of the Part 74 eligibility rules, Telex had failed to demonstrate that “Part 90 frequencies – for which nuclear facilities are eligible – would not suffice to provide the kind of communications services asserted to be necessary in such facilities.”³ The Bureau also noted that Telex had failed to show that the Telex equipment could not be adapted to provide the same functionality on Part 90 frequencies, or that new equipment could not be designed that would meet the industry's specific needs.⁴ The NEI/UTC blanket waiver request provides no information on what steps – if any – the industry has taken since the

³ *Id.* at ¶ 7.

⁴ *Id.*

recent decision to deny the Telex waiver request. Without evidence of new developments, there is no basis for revising that prior judgment.

Instead, the waiver request merely restates the conclusory assertions of the flawed Telex waiver request and presents a self-serving and supposedly “exhaustive survey”⁵ of its members. With such meager evidence before it, the Commission should not allow NEI/UTC’s members to encroach into the spectrum reserved for the public’s free, over-the-air television service.

It is a noteworthy fact, not mentioned in the NEI/UTC waiver request, that a Petition for Reconsideration of the denial of Telex’s waiver request remains pending before the Wireless Telecommunications Bureau. No action has been taken on this Petition, and the Commission should not allow NEI/UTC to “forum shop” by filing a replica of the denied waiver request to OET while that Petition remains pending before the Bureau.

If a blanket waiver were actually necessary to public safety, the waiver request would merit considerable attention. Evidence from the industry itself, however, shows that this is not the case. Specifically, in 2003, UTC told the Office of Engineering and Technology that “the use of Telex headsets is not expected to enhance security at these plants.”⁶ Moreover, the potential for interference of the Telex systems to television receivers could deny citizens access

⁵ NEI/UTC Blanket Waiver Petition at 17.

⁶ Letter from UTC to the Office of Engineering and Technology, Experimental Licensing Branch, April 21, 2003 (exhibit to Telex Waiver Denial) (“UTC letter”).

to important emergency information in the event of a public safety situation at a nuclear power plant in their community.⁷

Similarly untrue is NEI/UTC's claim concerning the purported unavailability of appropriate wireless headset and intercom devices for which a Part 90 user would be eligible. NEI/UTC do claim that nuclear plants require wireless headset and intercom systems that allow for "reliable, hands-free, full-duplex communications capabilities."⁸ However, contrary to the claim that Telex's Part 74 devices are the only such devices on the market, publicly available information proves that there are a number of hands-free, secure systems being sold right now that would satisfy the industry's desired specifications. For example, Clear-Com's CellCom 10 digital wireless intercom system provides hands-free and secure communications. Another option, HME's DX200 digital wireless intercom system, also provides encrypted, hands-free use. It is MSTV/NAB's understanding that the Society of Broadcast Engineers ("SBE") will provide significant documentation to the Commission concerning these devices. Under these circumstances, this new waiver request should be denied.

In fact, what is now evident is that some nuclear power plants purchased Telex equipment despite the fact that they were ineligible – breaking FCC rules. In 2003, UTC itself acknowledged in a letter accompanying its "experimental" license request to OET that "the headsets have been in use at nuclear power plants for some time," and "[o]nce the usage was discovered, the need for an STA – and a permanent rule waiver – was self-evident."⁹ That ill-

⁷ The Commission's current regulatory regime, which places emergency communications systems in Part 90 spectrum as opposed to local television broadcast spectrum, avoids this problem and should thus be respected.

⁸ NEI/UTC Blanket Waiver Petition at 13.

⁹ UTC letter.

advised investment in equipment is not a public reason for granting a blanket, industry-wide waiver in this case, and even if it was, would not be sufficient to justify such a waiver. Clearly, the nuclear power plants should not have purchased equipment for which they were ineligible. Nevertheless, the Commission could balance the equities of the situation and account for the past expenditures without accepting the nuclear industry's all-or-nothing approach. For example, instead of granting a blanket, industry-wide waiver, it could grandfather in those power plants that purchased the Telex equipment, on a secondary basis in the band, for a period of three years. This period of time is more than enough time to purchase and switch to a Part 90 compliant solution, and also would limit encroachment in this broadcast band during the final stage of the transition to digital broadcasting.

II. THE NEI/UTC WAIVER REQUEST OVERLOOKS MANY IMPORTANT QUESTIONS AS TO THE SCOPE OF OPERATION PROPOSED.

In addition to failing to justify the request for a blanket waiver of the rules, NEI and UTC do not address important questions concerning the scope of the proposed operation. Were OET to grant the waiver as requested, this unnecessary operation of Part 74 equipment by Part 90 licensees would likely cause harm to the viewing public.

First, the waiver request fails to adequately address the need for coordination between the nuclear power plant operators and affected local broadcasting entities. Second, NEI/UTC do not specify appropriate geographic limitations on the use of the Telex equipment. Third, the waiver request is deficient in stating details about the proper times during which the use of the Telex equipment would be permitted. Fourth, the waiver request is wholly lacking in any industry commitment to making significant, good-faith efforts towards finding a Part 90 compliant solution. Unless these concerns are addressed, the grant of a waiver would be inappropriate.

A. Coordination

Among other things, the NEI/UTC request for a waiver is inadequate because its proposed waiver fails to provide for: (i) notice to affected local entities that the nuclear power plant plans to use the Telex equipment on specific dates; (ii) a schedule of the specific times when the Telex use will begin and end; and (iii) an effective mechanism for notifying the affected broadcast viewers.

Although NEI/UTC state that they will make coordination efforts, they do not provide details about how they plan to achieve such coordination. A waiver of the eligibility rules would be improper unless the nuclear power plants are required to coordinate with affected broadcasting viewers within five miles of the plant.¹⁰

It is MSTV and the NAB's understanding that the nuclear plants have routinely failed to meet their coordination obligations, despite the requirement of the current STA. Substantive coordination efforts are crucial to the protection of viewers of free, over-the-air television services.

B. Geographic Limitations

Another serious flaw in the waiver request is that it provides no limitation on the permissible geographic areas in which the Telex equipment would be used. The request notes that the equipment is used primarily within the reactor buildings,¹¹ but then acknowledges that

¹⁰ Such coordination is vitally important during emergency situations. Absent such coordination, viewers living near nuclear power plants may be unable to receive important emergency broadcasts concerning any public safety situation at the plant.

¹¹ NEI/UTC Blanket Waiver Petition at 9.

nine plants use the equipment outside the reactor buildings but within the “protected area,” and that a small minority of the plants use the equipment beyond the “protected areas.”¹²

MSTV and the NAB respectfully suggest that if only nine of the nuclear power plants use the equipment outside of the reactor buildings, such use can hardly be considered critical. Use of the equipment outside of the reactor buildings would create a significant risk of interference to viewers of free, over-the-air television services. At the very least, the waiver request cannot be granted in its current form because it fails to limit the geographic scope to the areas where interference to eligible operations would be minimized – particularly within the nuclear reactor buildings that reportedly have walls between four to six feet thick.¹³

If a power plant desires to use the Telex equipment beyond the boundaries where nine or a “small minority” of its peer power plants use the equipment, it should have to file an individualized waiver request. Such outdoor use poses a greater risk of interference to legitimate operations at the same time that the NEI/UTC blanket waiver request makes clear that such use is not widespread or universal, and therefore not critical for the industry’s safety or security.

C. Temporal Limitations

The waiver request fails to commit to limiting the use of the Telex equipment to the times that the NEI and UTC assert as critical occasions for nuclear power plant operators. The request for the waiver notes that the nuclear power plants’ use of the equipment during “outages” is “virtually 24/7 for the entire 25-35 day outage period.”¹⁴ The waiver request asserts

¹² *Id.*

¹³ *Id.* at 5.

¹⁴ *Id.* at 9.

that use of the Telex equipment during non-outage times is “more episodic.”¹⁵ The waiver request, however, does not explain why the use of the equipment during times other than an outage is critical.

Such “non-outage” uses appear to be for (1) security and (2) training on simulator facilities.¹⁶ The UTC admission that the Telex equipment actually does *not* provide enhanced security undermines any claims that a blanket waiver is critical for such a non-outage use.¹⁷ Nor have NEI and UTC provided any evidence that explains why it is so important to use the equipment for the training simulations. Additionally, more frequent use of the Telex equipment by the industry would increase the risk of interference to free, over-the-air television. Ultimately, NEI and UTC fail in their attempts to justify why the use of the Telex wireless systems should be permitted to extend beyond the critical “outage” periods. If a power plant believes that the use of Telex equipment would be justified outside of these times, it should seek an individualized waiver.

D. Part 90 Compliant Solutions

Finally, NEI and UTC have failed to provide any reason for a blanket, industry-wide waiver of the Commission’s rules to last for *five* years. Not only would such a lengthy waiver of the Part 74 eligibility rules be unjustified, the industry has made no commitment to stop using the Telex equipment before the length of a waiver term ends, if a viable alternative is developed.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See* UTC letter.

As demonstrated above, the argument that non-Part 74 solutions are unavailable falls flat. If the industry is to benefit from a waiver of the rules, it should commit to filing a report every six months that demonstrates its investment and progress towards developing Part 90 compliant equipment. At the very least, it would be improper to grant a waiver of the eligibility rules without an effective commitment on the part of NEI and UTC to invest and report on the following benchmarks: (1) development of Part 90 compliant equipment; (2) testing of such equipment; (3) manufacturing and installing it nationwide; and (4) training workers on the new equipment. The industry is not entitled to any waivers unless and until it commits to make and report on these efforts, in order to meet its obligation that any use of the Part 74 free, over-the-air television services spectrum be limited to what is necessary.

Relatedly, even assuming *arguendo* that Part 90-compliant solutions are not currently available, the waiver petition fails to recognize that the nuclear industry's use of the Part 74 spectrum should cease once a solution is developed for Part 90 licensees. NEI/UTC's failure to consider such a condition highlight the *post hoc* nature of supposed justifications for the blanket waiver request; more likely, its members simply do not wish to bear the cost of the inappropriate purchase and use of wireless telecom and headset equipment for which they were not eligible.

CONCLUSION

The eligibility rules of Part 74 should be faithfully enforced, and the public is entitled to have its free, over-the-air television service protected from extraneous and unnecessary interference. NEI and UTC have failed to prove that the public safety requires a waiver of the Part 74 eligibility rules. Moreover, they have not met their burden in showing that Part 90 compliant solutions are unavailable, and have failed to address conditions designed to mitigate harm to the public's over-the-air television services. Absent significant revision of NEI/UTC's waiver request, MSTV and NAB respectfully request that the Petition be dismissed.

Respectfully submitted,

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